No. W2023-00713-SC-R11-CD

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,	
	Court of Criminal Appeals
Appellee,	**No. W2023-00713-CCA-R3-CD**
	Judge Montgomery
v.	
	Obion County Circuit Court
TORRIAN SEANTEL BISHOP	**No. CC-22-CR-22**
	Judge Parham
Appellant.	

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE IN SUPPORT OF APPELLANT TORRIAN SENTIAL BISHOP

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The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU's Criminal Law Reform Project (CLRP) advocates for the constitutional and civil rights of those impacted by criminal legal systems. We use litigation and advocacy to confront systemic government conduct that fuels the carceral state and police abuse, and oppresses people based on race, class, and other characteristics. CLRP does this work because everyone suspected, accused, or convicted of a crime deserves dignity, fairness, and an opportunity to thrive.

In furtherance of its mission, the ACLU has participated as a party or amicus in numerous cases raising Fourth Amendment and cannabis issues, including *Illinois v. Caballes*, 543 U.S. 405 (2005); *People v. Redmond*, 2024 IL 129201 (Sept. 19, 2024); *Baxter v. State*, 389 So.3d 803 (Fla. Dist. Ct. App. 2024); and *State v. Torgerson*, 995 N.W.2d 164 (Minn. 2023). The ACLU has also participated in numerous cases implicating access to justice, including *Natalie R. v. State*, 2025 WL 868649 (Utah Mar. 20, 2025); *Mich. Immigrant Rts. Ctr. v. Whitmer*, Nos. 167300, 167301 (Mich. filed Oct. 8, 2024), *State v. Fernandez*, No. S071340 (Or. filed Jan. 29, 2025).

The ACLU-TN, the state-wide Tennessee affiliate of the ACLU, is a private, nonprofit, nonpartisan organization supported by thousands of members and supporters across Tennessee. The mission of the ACLU-TN is dedicated to translating the guarantees of the Bill of Rights into reality for all Tennesseans. ACLU-TN is an enduring guardian of justice, freedom, fairness and equality, working to protect and advance civil liberties and civil rights for all Tennesseans. Our goal is to preserve the Bill of Rights for future generations.

STATEMENT OF THE CASE

This appeal arises from the trial court's denial of Bishop's motion to suppress, on U.S. and Tennessee Constitutional grounds, evidence found during a police search of his car. The trial court's ruling rested entirely on its conclusion that the smell of cannabis, without more, supplied probable cause to search the car. *See State v. Bishop*, No. W2023-00713-CCA-R3-CD, 2024 WL 1564346, at *2 (Tenn. Crim. App. Apr. 11, 2024) (*Bishop I*), *appeal granted, cause remanded*, No. W2023-00713-SC-R11-CD, 2024 WL 4204686 (Tenn. Sept. 12, 2024).

Following the denial of his motion to suppress, Bishop entered an *Alford* plea and expressly reserved a question for appeal pursuant to Rule 37(b)(2)(A) of the Tennessee Rules of Criminal Procedure, which allows for an appeal of a "certified question of law that is dispositive of the case." Tenn. R. Crim. P. 37(b)(2)(A). Here, both the State and the trial court consented to the appeal and certified that the

question was dispositive of the case. The certified question asked whether, as the trial court ruled, the odor of cannabis alone can supply probable cause to search a vehicle. *State v. Bishop*, No. W2023-00713-CCA-R3-CD, 2024 WL 4798895, at *2 (Tenn. Crim. App. Nov. 15, 2024) (*Bishop II*).

In its initial review of this case, the Court of Appeals held that this certified question was dispositive, proceeded to the merits, and affirmed the trial court. With respect to the certified question, the Court of Appeals concluded that it satisfied the requirements of Rule 37(b)(2)(A): "We agree with the parties that the certified question is dispositive of the case because the officers searched the Defendant's car as a result of Sergeant Rogers's smelling the odor of marijuana, which the officers believed provided them with probable cause to search the car." *Bishop I*, 2024 WL 1564346, at *3. With respect to the merits, the Court of Appeals held that, although the officer could not differentiate between the odor of lawful hemp and the odor of unlawful marijuana, conducting a search based on odor alone was constitutional. *Id.* at *3–4.

This Court then held otherwise. In *State v. Green*, 697 S.W.3d 634 (Tenn. 2024), the Court reviewed a vehicle search following an alert by a drug-sniffing dog that, like the officer here, could not distinguish between lawful hemp and unlawful marijuana. This Court expressly rejected "a per se rule of probable cause based on a positive alert." *Id.* at 642–43. Instead, the Court endorsed a totality-of-the-

circumstances test, under which "a positive indication from a drug-sniffing canine may continue to contribute to a finding of probable cause when examining the totality of the circumstances, notwithstanding the legalization of hemp." *Id.* at 646.

This Court remanded this case to the Court of Appeals "for reconsideration in light of this Court's decision" in *Green*. *See State v. Bishop*, No. W2023-00713-SC-R11-CD, 2024 WL 4204686, at *1 (Tenn. Sept. 12, 2024).

On remand, the Court of Appeals held that it lacked jurisdiction. Despite previously holding (in *Bishop I*) that the certified question was dispositive of the case, in *Bishop II* the Court of Appeals held that it was not. *See Bishop II*, 2024 WL 4798895, at *1. The court appeared to reason that because the trial court had incorrectly denied the motion to suppress based solely on odor—under the per se rule rejected in *Green*—it had been incumbent on Bishop to formulate a certified question asking whether there were additional facts, beyond odor, that could have justified denying his motion to suppress. *See id.* at *3–4.

In granting review of the decision in *Bishop II,* this Court invited briefing on any "potential revisions to the procedure and analysis for certified questions as adopted by this Court in *State v. Preston,* 759 S.W.2d 647 (Tenn. 1988), and set forth in Tennessee Rule of Criminal Procedure 37(b)(2)(A)(i-iv)." *State v. Bishop,* No. W2023-00713-SC-R11-CD, 2025 WL 832433, at *1 (Tenn. Mar. 14, 2025).

SUMMARY OF ARGUMENT

This case presents the certified dispositive question of whether, under the Fourth Amendment to the U.S. Constitution and Article I, section 7 of the Tennessee Constitution, Union City Police Department officers possessed probable cause to conduct a warrantless search of Bishop's vehicle based exclusively on the alleged odor of cannabis, when the officer claiming to have probable cause to search the vehicle admittedly could not distinguish between the odor of illegal marijuana and the odor of legal hemp.

Before the legalization of hemp, *see* 7 U.S.C. § 1639(o)(1); Tenn. Code Ann. §§ 43-27-101(3), 39-17-402(16)(C) (excluding "hemp" from Tennessee's schedule of controlled substances), the odor of cannabis in the State of Tennessee could be properly deemed suggestive of illegal activity because all cannabis was illegal. As such, Tennessee courts reasoned the odor of *contraband marijuana*[1]—when recognized by an officer deemed by a court to be credible and qualified to recognize its distinctive odor as an illegal narcotic—alone was a sufficient basis for probable cause.

However, since the legalization of hemp in Tennessee and the continued increase in the number of people non-criminally *and* lawfully buying, possessing,

[1] *See State v. Hughes*, 544 S.W.2d 99, 101 (Tenn. 1976); *Hicks v. State*, 534 S.W.2d 872, 874 (Tenn. Crim. App. 1975).

and using cannabis in the state, the odor of cannabis is no longer *per se* suggestive of criminal activity. *See State v. Green*, 697 S.W.3d at 644 ("the legalization of hemp has added a degree of ambiguity to a dog's positive alert [to cannabis]"). Indeed, since 2019, there can be a multitude of non-criminal ways an individual or a vehicle in Tennessee can come to carry the odor of cannabis.[2] Therefore, the odor of cannabis is no longer inherently indicative of criminal activity, and police should not be permitted to draw unreasonable incriminating inferences from an odor that can be, and in many instances is, entirely legal.

In addition, the Court has jurisdiction to answer Bishop's certified question. The question plainly satisfies the elements of Rule 37(b)(2)(A), and this Court's previous remand order supplies further basis for jurisdiction. Any contrary holding would raise grave constitutional concerns.

Amici respectfully submit that this court should hold that an officer's alleged detection of the odor of cannabis—without at least some other specific, articulable fact to bolster a reasonable belief that criminal activity is occurring—is insufficient to establish probable cause to conduct a warrantless search of a vehicle. This Court

[2] *See, e.g., People v. Molina*, 208 N.E.3d 579 (Ill. 2021) ("Persons using, possessing, or otherwise around raw cannabis wholly within the bounds of the law can, and likely will, have the odor of cannabis on their clothes, hair, and even personal effects."), *rev'd, 2022 IL App (4th) 220152, appeal granted*, 2023 IL 129237.

should further hold there was not probable cause to conduct a warrantless search of Bishop's vehicle and vacate his conviction.

ARGUMENT

I. The Odor Of Cannabis Alone Is Insufficient To Support Probable Cause To Conduct Warrantless Vehicle Searches.

Probable cause exists if "at the time of [a seizure], the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense." *State v. Dotson*, 450 S.W.3d 1, 50 (Tenn. 2014) (quoting *State v. Echols*, 382 S.W.3d 266, 277–78 (Tenn. 2012)). As explained below, the odor of cannabis—which includes *both* lawful hemp and illegal marijuana—cannot meet that standard.

A. Under the Totality-of-the-Circumstances Test, the Applicable Standard, a Factor's Weight Must Evolve with the Law.

A factor's weight in a totality-of-the-circumstances probable cause determination is necessarily fluid. *See Illinois v. Gates*, 462 U.S. 213, 232 (1983) ("probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."). This is because the "[t]he ultimate touchstone of the Fourth Amendment is reasonableness," *State v. Reynolds*, 504 S.W.3d 283, 304 (Tenn. 2016) (quoting *Kentucky v. King*, 563 U.S. 452, 459 (2011)) (cleaned up), and what

is reasonable is informed by context. As such, courts regularly conduct probable cause assessments that account for changes in the law and how they impact the reasonableness of an officer's actions. *See, e.g.*, *People v. Zuniga*, 372 P.3d 1052, 1059 (Col. 2016) ("odor of marijuana can properly be considered as part of the totality of the circumstances test for probable cause" but is insufficient on its own given the legality of marijuana possession for adult personal use).[3]

What might have once been sufficient for probable cause to conduct a warrantless search may diminish over time. And, with the continued evolution of both law and culture, the same evidence may eventually create only reasonable suspicion or no suspicion of criminal activity at all.[4] In assessing probable cause, this Court should not ignore the evolution of cannabis in law.[5] The change to the

[3] *See also, e.g.*, *Matter of T. T.*, 479 P.3d 598, 611 (Or. Ct. App. 2021) *review denied sub nom. State v. T. T.,* 484 P.3d 1071 (Or. 2021) ("given the legality of an adult possessing some amount of marijuana in Oregon, the smell of marijuana in a car in which an adult is present is no longer remarkable, and, by itself, does not give rise to reasonable suspicion that it is being unlawfully possessed by or delivered to an underage passenger."); *People v. Lee*, 40 Cal. App. 5th 853, 861 (2019) (same); *Commonwealth v. Cruz*, 945 N.E.2d 899, 910 (Mass. 2011) (same); *People v. Brukner*, 25 N.Y.S.3d 559, 572 (N.Y. City Ct. 2015) (same).

[4] *See, e.g.*, *Johnson v. United States*, 333 U.S. 10, 13 (1948) (finding that the odor of the "forbidden substance" is so distinctive that "it might very well be found to be evidence of the most persuasive character.").

[5] *See, e.g., Riley v. California,* 573 U.S. 373 (2014) (finding the new nature of a cell phone as a digital storage device deserves different protection in the search incident to arrest context); *Carpenter v. United States*, 585 U.S. 296 (2018) (employing a normative adjustment in the digital context and rejecting application of the "third party doctrine" to cell site location information).

legal status of cannabis in the United States and Tennessee necessitates reducing the weight that should be given to the odor of cannabis in a probable cause assessment. Before the passage of the federal Agricultural Improvement Act of 2018 and Public Chapter 87 in 2019 cannabis, irrespective of its form or source, was unlawful. Thus, whether from hemp or marijuana, the odor of cannabis created a reasonable inference of the presence of contraband (*i.e.*, anything that the law prohibits possessing).[6] *See Hughes*, 544 S.W.2d at 101; *Hicks,* 534 S.W.2d at 874. However, now that a form of cannabis has been made legal, the calculus is altered.

Unlike in the mid-1970s when *Hughes* and *Hicks* were decided, cannabis is neither *per se* illegal, *see* Tenn. Code Ann. §§ 39-17-402(16)(C), -415(c), -417, nor has it been at any time since hemp was legalized in Tennessee. *See State v. Green*, No. M2022-00899-SC-R11-CD, 2024 WL 3942511, at *3 (Tenn. Aug. 27, 2024) ("Due to the removal of hemp from the definition of marijuana, the possession of hemp is legal in Tennessee."). The status of cannabis at the time these cases were decided was integral to their holdings. In *Hughes,* 544 S.W.2d at 101, this Court stated "the generally accepted rule is that the detection of *the distinctive odor of a contraband substance* may, under particular circumstances, constitute probable cause to search" and held:

[6] *Black's Law Dictionary* defines 'contraband' as "[g]oods that are unlawful to import, export, produce, or possess." (12th ed. 2024).

> The officer who testified that he smelled the odor of marijuana coming from the vehicle when [defendant] lowered the window also testified that by reason of his training and experience he was able to detect and identify the distinctive odor of marijuana. In our opinion, this constituted probable cause to believe that the vehicle contained *contraband marijuana*.

Likewise, in *Hicks*, the Court of Appeals stated "at the time of this offense marijuana was defined and limited to cannabis sativa L" and "cannabis sativa L includes all geographical types of marijuana." 534 S.W. at 874. After recognizing that the "the trial court held that the officer was qualified to recognize the distinctive odor of marijuana smoke," the court reasoned there was probable cause to conduct a warrantless search of the vehicle because:

> the officer's actions, prior to the time he smelled the odor of the *contraband marijuana*, were permissible, the smell of marijuana established probable cause to believe that a crime other than the traffic violation had been committed. *Id*.

Based on this, the precedent these cases established is that the odor of cannabis—when detected by an officer qualified to recognize it as distinctive of a *contraband substance*—is alone sufficient to establish probable cause to conduct a warrantless search of a vehicle.[7] However, once Tennessee law no longer recognized

[7] This rule is consistent with U.S. Supreme Court precedent. *See Taylor v. United States*, 286 U.S. 1, 6 (1932) ("Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip [an individual] of constitutional guaranties (Const. Amend. 4) against unreasonable search."); *Johnson v. United States*, 333 U.S. 10, 13 (1948) (odors

cannabis as *per se* unlawful, its odor was no longer distinctive of a contraband substance only, and *Hughes*, *Hicks*, and their progeny ceased to bind cases, like this one, where the searching officer is unable to differentiate between the odor of hemp and marijuana. *See State v. Bishop*, No. W2023-00713-CCA-R3-CD, 2024 WL 1564346, at *3 (Tenn. Crim. App. Apr. 11, 2024) ("On cross-examination, Sergeant Rogers acknowledged that he could not differentiate between the odor of hemp and marijuana."). Thus, whether an officer may establish probable cause to conduct a warrantless search of a vehicle based exclusively on the alleged odor of cannabis has been an open question since Tennessee legalized hemp—which was years before the underlying incident at issue here.

B. The Odor of Cannabis Alone Is an Unreliable Indicator of the Presence of Contraband and Should Be Given Little Weight in a Totality-of-the-Circumstances Probable Cause Assessment.

The issue before this Court is whether, since the legalization of hemp in 2019, an officer's alleged detection of the odor of cannabis—the reliability of which should not be presumed—can alone establish probable cause under a totality-of-the-circumstances probable cause determination. The answer is no. The odor of cannabis does not create a "fair probability" that contraband or evidence of a crime will be

provide probable cause to search *only* when "[if the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance.").

found in the location searched. *Illinois v. Gates*, 462 U.S. at 238. Probable cause determinations "[do] not deal with hard certainties, but with probabilities" informed by judgments based on objective facts.[8] And probability in a constitutional context does not require empirical precision. Rather, it necessitates a common-sense assessment of general numbers and chance.[9]

As an initial matter, the presence of an odor is not necessarily indicative of the presence of the source of the odor. This is because odors are diffuse. They linger and can persist long after the substance that the odor originated from is gone. The characteristic smell associated with cannabis is especially prone to this effect because of the plant's highly odorous compounds (terpenes) that transfer and attach to different surfaces, especially porous ones, like fabrics (e.g., clothes, and upholstered vehicle interiors, furniture, etc.). *See* Somchai Rice & Jacek A. Koziel, *Characterizing the Smell of Marijuana by Odor Impact of Volatile Compounds: An Application of Simultaneous Chemical and Sensory Analysis*, 10 PLOS ONE (2015), https://doi.org/10.1371/journal.pone.0144160. Although the chemical process that causes residual odors is itself a scientific discipline, the concept is a matter of common sense. Odors that one smells on a regular basis are the result of the same process. For example, when one passes a stranger on the street and is met by the

[8] *United States v. Cortez*, 449 U.S. 411, 418 (1981).
[9] *See, e.g.*, *Texas v. Brown*, 460 U.S. 730, 742 (1983) ("A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required.").

smell of their cologne or perfume, most reasonable people would not assume the stranger has the cologne or perfume bottle on their person.

Nevertheless, even assuming *arguendo* that the odor of cannabis suggests the plant itself is in the vicinity of the area to be searched, there is no longer a fair probability that the searching officer will discover *illegal marijuana*. This is because, since the legalization of hemp, there has been a meteoric rise both in the number of Tennesseans who use lawful hemp-derived products and in the amount of legal hemp produced, transported, sold, and purchased in Tennessee. *See* TENNESSEE DEPARTMENT OF REVENUE, Revenue Collections, June 2024 https://www.tn.gov/content/dam/tn/revenue/documents/pubs/2024/Coll202406.pdf (documenting that the hemp-derived cannabinoid market in Tennessee generated over $11 million dollars in state tax revenue from July 2023–June 2024).

Accordingly, a law enforcement officer who allegedly smells the odor of cannabis has no way of knowing whether they are smelling legal hemp or illegal marijuana, or that the substance is even in the vicinity. Unlawfully possessed marijuana and lawfully possessed hemp both derive from the plant genus, cannabis, and look, feel, and smell the same—so much so that drug-sniffing dogs, let alone police officers, are unable to distinguish them.[10] The Tennessee Bureau of

[10] *See* Cynthia Sherwood, Alexander Mills, & Davis Griffin, *Even Dogs Can't Smell the Difference:*
The Death of "Plain Smell," As Hemp Is Legalized, 55 TENN. BAR J. 14 (Dec. 2019).

Investigation's forensic lab even struggles to differentiate hemp from marijuana. Mike Lyttle, Assistant Director of the Forensic Services Division of the Tennessee Bureau of Investigation acknowledged as much: "It's the same plant, the same species. It feels the same. It looks the same. It reacts the same way to most chemicals…It's the biggest challenge in forensic science."[11] Today, if an officer allegedly smells the odor of cannabis, they cannot be certain *which type* of cannabis produced the odor. And the ever-increasing prevalence of legal hemp in Tennessee makes it less likely—and therefore less reasonable to conclude—its odor derives from unlawful cannabis. Without more, the odor is simply not "reasonably trustworthy information" that is sufficient "to warrant a prudent person in believing that [an individual] had committed or was committing an offense." *Dotson*, 450 S.W. at 50. As the U.S. Supreme Court explained, probable cause and reasonable suspicion "dependent upon both the content of the information possessed by police *and its degree of reliability*." *Alabama v. White*, 496 U.S. 325, 330 (1990) (emphasis added).

Indeed, other state high courts recognize that, where people can possess and use cannabis both legally and illegally, police must point to facts beyond the odor of

[11] Mariah Timms & Brinley Hineman, *'If it quacks like a duck, we will arrest': Rutherford County law enforcement react to clarified TBI marijuana testing policies*, THE TENNESSEAN (Oct. 2, 2019), https://www.tennessean.com/story/news/2019/10/02/tbi-drug-tests-marijuana-decriminalization-murfreesboro-police-defense-advice/3845894002/.

cannabis to demonstrate that the conduct is illegal. *See, e.g.*, *People v. Redmond*, 2024 IL 129201 at ¶ 47 (Sept. 19, 2024) ("given the fact that under Illinois law the use and possession of cannabis is legal in some situations and illegal in others, the odor of burnt cannabis in a motor vehicle, standing alone, is not a sufficiently inculpatory fact that reliably points to who used the cannabis, when the cannabis was used, or where the cannabis was used."); *Baxter v. State*, 389 So.3d at 810–11 ("The incremental legalization of certain types of cannabis at both the federal and state level has reached the point that its plain smell does not immediately indicate the presence of an illegal substance. As a result, the smell of cannabis cannot on its own support a detention."); *State v. Torgerson*, 995 N.W. 2d at 170, 173–74(declining to create a bright-line rule based on the odor of cannabis because possession and use of cannabis is not always a crime in Minnesota and holding that the odor of cannabis is merely a factor to be considered in the totality of the circumstances analysis); *Commonwealth v. Barr*, 266 A.3d 25, 41 (Pa. 2021) ("the smell of marijuana alone cannot create probable cause to justify a search…."); *Commonwealth v. Overmyer*, 11 N.E.3d 1054, 1055 (Mass. 2014) (holding that decriminalization of cannabis meant that the odor of cannabis alone was not sufficient to permit the search of a vehicle) (citing *Cruz*, 945 N.E.2d 899, 910 (Mass. 2011).

This Court and several other state supreme courts have endorsed, in related contexts, the general principle that police cannot establish probable cause based

solely on the discovery of items that have legal and nonlegal uses. For example, in *Bridges*, this Court held that an officer's feeling of a pill bottle during a valid investigatory stop and pat down search did not give him probable cause to believe that the object was contraband or contained contraband. *State v. Bridges,* 963 S.W.2d 487, 495 (1997). Because whether a pill bottle contains contraband depends on what's inside and whether the owner has or needs a prescription for the material, the *Bridges* Court found that the officer could not have concluded that the pill bottle contained contraband, and "unless he was clairvoyant, he could not have discerned the contents from merely touching the container." *Id.; see also Commonwealth v. Landry,* 779 N.E.2d 638, 641 (Mass. 2002) ("Possessing a hypodermic needle is not necessarily a crime" and cannot create probable cause because many individuals "may lawfully possess hypodermic needles.").

Just as finding a pill bottle in *Bridges* was insufficient to establish probable cause because it may have "enclose[d] legal medication," so too is the alleged odor of cannabis because the odor may be lawful hemp. *Bridges,* 963 S.W.2d at 495. Of course, the alleged odor of cannabis may factor into a court's analysis, "but it is not dispositive and does not end a court's inquiry." *Id.* As this Court explained in *Bridges*, "[t]he officer's subjective belief that the object is contraband is not sufficient unless it is objectively reasonable in light of all the circumstances known at the time of the search." *Id* at 494–95; *see also State v. Evetts,* 670 S.W.2d 640,

642 (Tenn. Crim. App. 1984) (finding that probable cause to arrest was established by the smell of alcohol *and* Evetts's collision with another vehicle).

Similar logic has been long employed by this Court in another context, as well. Take, for example, cases that have considered the degree of suspicion that attaches to the possession of a firearm—an act that can also either be legal or illegal in Tennessee, depending on the context—and determined the suspicion is insufficient to establish probable cause to believe the armed individual committed a crime. In *State v. Williamson*, this Court found that because "possession of a firearm in this state is not necessarily a crime," absent some articulable basis to believe the firearm is unlawfully possessed, the mere possession of a gun, alone, will not support reasonable suspicion for a *Terry* stop (a lower standard than probable cause). 368 S.W.3d 468, 482 (Tenn. 2012).

In *Williamson*, this Court reached its holding by reasoning the information provided by the tip—which, for the purpose of comparison, is analogous to the officers' alleged detection of the odor of cannabis in this case[12]—did not indicate that the defendant's possession of the handgun was unlawful. *Id.* at 483. *See also United States v. Gaskin*, 2023 WL 3998329, *7 (D. Conn. June 14, 2023) (stating that "an individual cannot be presumed to be carrying a firearm unlawfully simply

[12] What is needed in both cases is sufficient indicia of reliability to establish that the indication—whether the tip or an officer's sniff—in fact reliably signals the existence of contraband.

because of their possession of a firearm"); *Kilburn v. State*, 297 So. 3d 671, 675 (Fla. Dist. Ct. App. 2020) ("A potentially lawful activity cannot be the sole basis for a detention. If this were allowed, the Fourth Amendment would be eviscerated"); *Commonwealth v. Alvarado*, 667 N.E.2d 856 (Mass. 1996) (the presence of a firearm, without more, does not furnish probable cause or reasonable suspicion sufficient to justify a police officer's seizure of an individual).

Ultimately, as the reasoning in the aforementioned cases supports, when an officer purportedly smells the odor of cannabis, it is unreasonable for the officer to conclude that the mere odor alone provides probable cause for a warrantless search of a vehicle.

II. The Certified Question In This Case Is Dispositive And This Court Has Jurisdiction To Decide It.

The trial court denied Bishop's motion to suppress by applying a per se rule that odor automatically supplies probable cause. Bishop's certified question straightforwardly asks whether the trial court got it right—that is, whether "probable cause" arises "exclusively" from odor. *Bishop II*, 2024 WL 4798895, at *2. Under *Green*, the answer is unequivocally "no." *See Green*, 697 S.W.3d at 646. That answer is dispositive within the meaning of Rule 37(b)(2)(A) because it supplies a basis to reverse the trial court's judgment. *See* Tenn. R. Crim. P. 37(b)(2)(A). In contrast, the Court of Appeals' approach violates Rule 37(b)(2)(A) by requiring defendants to

advance alternate grounds to affirm mistaken trial court rulings. That requirement appears nowhere in Rule 37. It also raises serious constitutional questions because under the Court of Appeals' rule, paradoxically, the more legal mistakes that a trial court makes, the harder it becomes for a defendant to appeal.

A. Bishop's Certified Question Satisfies Rule 37(b)(2)(A).

Rule 37(b)(2)(A) provides a mechanism for defendants to reserve an appeal while entering a plea of guilty or nolo contendere. Here, Bishop's certified question plainly satisfied that mechanism.

1. A certified question can qualify as dispositive without addressing potential alternative grounds for affirming the trial court.

When a trial court denies a motion to suppress evidence, Rule 37(b)(2)(A) allows the defendant to appeal that ruling by entering a plea of guilty or nolo contendere and then, with the consent of the trial court and the state, to certify a question asking whether the trial court's rationale for denying the motion was correct. That is what Bishop did here. He certified a question asking whether the trial court's rationale for denying his motion to suppress—the odor of cannabis alone—was correct.

Under Rule 37(b)(2)(A), a defendant may appeal a plea of guilty or nolo contendere by "explicitly reserv[ing] . . . the right to appeal a certified question of law that is dispositive of the case." Tenn. R. Crim. P. 37(b)(2)(A). The question of law must "identif[y] clearly the scope and limits of the legal issue reserved," *id.*

37(b)(2)(A)(ii), as well as "the reasons relied upon by the defendant." *Preston*, 759 S.W.2d at 650. But nowhere does Rule 37 require the defendant to formulate a legal question that mentions all possible alternate grounds for affirming the trial court.

For example, in *State v. Nicholson*, 188 S.W.3d 649 (Tenn. 2006), this Court considered a certified question asking whether evidence seized during a pedestrian stop "should have been suppressed because it was seized pursuant to the warrantless arrest of the defendant for which the police had no probable cause." *Id.* at 655–56. This Court ultimately concluded that the governing standard was reasonable suspicion, which meant that the absence of probable cause was insufficient to resolve the case. *Id.* at 659. Yet this Court still deemed the certified question "dispositive and . . . properly before this Court." *Id.* at 656.

In doing so, this Court did not fault the certified question for failing to mention reasonable suspicion. Nor did the Court fault the question for failing to rule out exceptions—such as plain view or exigent circumstances—that could have overcome the absence of reasonable suspicion or probable cause. Instead, consistent with "all parties' opinion that the question is dispositive of the case," the Court proceeded to assess the trial court's analysis, which had been incorrect. *Id.*; *see also State v. Springer*, 406 S.W.3d 526, 531 (Tenn. 2013) (holding that the "substance" of certified question satisfied Rule 37(b)(2)(A), notwithstanding absence of "more fact-specific references").

2. The legal question certified in this case is dispositive.

The certified question in this case satisfies Rule 37(b)(2)(A). For starters, it identifies "the scope and limits of the legal issue reserved," *see* Tenn. R. Crim. P. 37(b)(2)(i)(B), because, as in *Nicholson*, it frames the question issue around "probable cause." *See Bishop II*, 2024 WL 4798895, at *2; *Nicholson*, 188 S.W.3d at 655–56. Next, the question homes in on the per se rule used by the trial court—namely, its conclusion that police could "search [Bishop's] automobile without a warrant based exclusively on the allegedly plain smell of marijuana." *Bishop II*, 2024 WL 4798895, at *2. And finally, the question squarely asks whether probable cause arose "exclusively" from odor. *Id.* Because odor was the trial court's sole rationale for finding probable cause, and because this Court's decision in *Green* dictates that odor alone does not supply probable cause, the answer to the certified question is "no," and the trial court's contrary holding is reversible error.

Thus, as in *Nicholson*, the certified question is "dispositive and is properly before this Court." *Nicholson,* 188 S.W.3d at 656. Because the trial court gave only one basis for denying Bishop's motion to suppress, and because both the trial court and the State agreed that the certified question was dispositive, it was not necessary for Bishop to raise additional facts that the trial might have mentioned (but didn't) to shore up its holding. Instead, as in *Nicholson*, where this Court did not require the defendant to enumerate all the ways the pedestrian stop might have been upheld, it

was sufficient for the certified question to challenge the trial court's actual rationale. *Id.*

The Court of Appeals concluded otherwise. It did not dispute that the trial court had denied Bishop's motion to suppress based solely on its view that, without more, the odor of marijuana alone supplies probable cause to conduct a search. Nor did the Court of Appeals dispute that, under *Green*, the trial court's ruling was incorrect as a matter of law. But the Court of Appeals nevertheless concluded that despite Bishop being right that the trial court committed legal error, it had been incumbent on him to formulate a certified question asking whether the trial court's judgment could nevertheless be affirmed based on the totality-of-the-circumstances test that the trial court never applied, using facts that the trial court never found.

The Court of Appeals' view is wrong for at least four reasons.

First, the hypothetical possibility that the trial court might have denied the motion to suppress if it had applied a totality-of-the-circumstances test does not make the certified question any less dispositive. The question asks whether, as the trial court held, "probable cause" arose "exclusively" from odor. Under *Green*, it did not; the odor of cannabis alone cannot supply probable clause. Under basic principles of appellate review, the trial court's legally erroneous ruling was reversible error, and the certified question appropriately tees up that error for

appellate review. *See State v. Mangrum*, 403 S.W.3d 152, 166 (Tenn. 2013) (noting that a trial court abuses its discretion when it "applies an incorrect legal standard").

Second, by faulting Bishop for failing to draft a question encompassing alternative grounds for affirming the trial court—that is, grounds on which the trial court itself did not rely—the Court of Appeals misapprehend the nature of appellate review. Where, as here, a trial court issues a ruling based on a flawed rationale, an appellate court typically "*may* affirm [the] judgment on different grounds than those relied upon by the lower court." *State v. Hester*, 324 S.W.3d 1, 21 n.9 (Tenn. 2010) (emphasis added); *Allstate Ins. Co. v. Tarrant*, 363 S.W.3d 508, 522 n.11 (Tenn. 2012). But the law never *requires* an appellate court to do that. An appellate court need not ride to the rescue of a trial court that has committed an error. So, in this case, the Court of Appeals was under no obligation to decide whether the trial court could have found probable cause by considering facts beyond odor. And because the Court of Appeals was under no obligation to consider those additional facts, Bishop was under no obligation to formulate a certified question encompassing them.

Third, because Rule 37(b)(2)(A) provides that the trial court and the State have a role in formulating the certified question, it is especially inappropriate to interpret the rule to require the defendant to raise alternative grounds for affirmance that were not relied upon by the trial court. Under Rule 37(b)(2)(A)(iv), certifying a question for appellate review requires the consent of the State and the trial court.

And, as the Court of Appeals noted, the State and the trial court provided that consent in this case. *Bishop II*, 2024 WL 4798895, at *3. This Court has cautioned that that the State "would be prudent to review the certified question" because "a certified question too narrow in scope may work to the State's detriment." *State v. Day*, 263 S.W.3d 891, 900 n.8 (Tenn. 2008). Here, if the State had wanted to present additional facts as alternative grounds for affirming the district court, it could have pressed to include those facts in the certified question. But the State did not do so. Although that decision might have been a strategic blunder, it was a blunder by the State, not Bishop. And it did not rob the Court of Appeals of jurisdiction to say that, under *Green*, probable cause did not arise "exclusively" from odor.

Fourth, the Court of Appeals jurisdictional analysis failed to account for this Court's remand order. Rule 37 authorizes a defendant to appeal when "the law provides for such appeal." Tenn. R. Crim. P. 37(b). Here, in addition to all the reasons stated above, "the law" provided an additional ground to hear Bishop's appeal: this Court issued an order expressly authorizing the Court of Appeals to revisit its decision in *Bishop I* in light of this Court's decision in *Green*. An appellate court's remand order can alter the scope of a lower court's jurisdiction. *See* Tenn. Code Ann. § 21–1–810 (1994) (cases on remand may proceed "in accordance with the decree of the appellate court"). Here, "the law" of this case, as established by this Court's

remand order, confirmed that the Court of Appeals had jurisdiction to reach the merits.

B. Deeming Bishop's Certified Question to Be Non-Dispositive Would Raise Serious Doubts About the Constitutionality of Rule 37.

Under the canon of constitutional avoidance, in construing texts, this Court resolves every doubt in favor of ensuring the text's constitutionality. *Cf. State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002) (stating the rule in the context of construing a statute); *In re Burson*, 909 S.W.2d 768, 775 (Tenn. 1995) (same). In this case, any doubt about the proper construction of Rule 37 should be resolved in favor of jurisdiction because the Court of Appeals' construction, if upheld, would cast serious doubt on Rule 37's constitutionality.

Although neither the U.S. Supreme Court nor this Court has articulated a freestanding constitutional right to appeal, "where appellate review is provided by statute, the proceedings must comport with constitutional standards." *Serrano v. State*, 133 S.W.3d 599, 604 (Tenn. 2004); *see also State v. Gillespie*, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994). For example, relying on both the Due Process and Equal Protection Clauses of the U.S. Constitution, the U.S. Supreme Court has held that states cannot deny indigent defendants the opportunity to participate in the appellate process simply because they cannot afford the cost of a transcript. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). For similar reasons, the U.S. Supreme Court has also held that, where a state provides an opportunity to appeal as of right, the

defendant is entitled to the assistance of counsel in that appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985). In doing so, the Court has emphasized that a state must not institute rules that "decide[] [an] appeal in a way that [is] arbitrary with respect to the issues involved." *Id.* at 404. And, in assessing whether particular appellate rules are unconstitutional, "[t]he question is not one of absolutes, but one of degrees." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

Those admonitions apply with special force in Tennessee because the Tennessee Constitution contains an Open Courts Clause guaranteeing that "all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." Tenn. Const. art. I, § 17. The Open Courts Clause is decidedly "a mandate to the judiciary." *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522, 524 (Tenn. 1981). That mandate, like the U.S. Supreme Court's cases, cuts against construing appellate rules to impose arbitrary jurisdictional restrictions on the openness of courts to parties aggrieved by lower court rulings.

Yet the Court of Appeals' approach does just that. Under its decision, if the defendant certifies a question challenging a trial court ruling that, in the Court of Appeals' view, was completely correct, then the Court of Appeals will deem the question dispositive and find jurisdiction under Rule 37(b)(2)(A). In contrast, if the

defendant certifies a question challenging a flawed trial court ruling, the Court of Appeals may deem the certified question non-dispositive and find that jurisdiction is absent, on the theory that the certified question fails to encompass some alternate ground for affirming the trial court.

This is not just speculation. In this very case, the Court of Appeals concluded that it had jurisdiction in *Bishop I*, when it believed this Court's case law supported the trial court's reliance on odor alone, but not in *Bishop II*, after this Court clarified that its case law did not support the trial court's reasoning. Indeed, under the Court of Appeals' approach, the more a trial court strays from governing doctrine and relevant facts, the more likely that the Court of Appeals will hold that it lacks jurisdiction to decide a certified question challenging the trial court's erroneous ruling.

That cannot be right. Requiring defendants who appeal *incorrect* trial court rulings to run a more rigorous jurisdictional gauntlet than defendants who appeal *correct* trial court rulings is just as arbitrary as apportioning appellate opportunities by wealth. *Cf. Griffin*, 351 U.S. at 18; *Evitts*, 469 U.S. at 404. For that reason, endorsing the Court of Appeals' construction of Rule 37(b)(2)(A) would raise serious constitutional concerns under both the U.S. and Tennessee Constitutions. This Court should decline to do that.

CONCLUSION

For the reasons stated, *Amici* respectfully submit that this Court should hold that that Bishop's certified question satisfies the elements of Rule 37(b)(2)(A), and an officer's alleged detection of the odor of cannabis—without at least some other specific, articulable fact to bolster a reasonable belief that criminal activity is occurring—is insufficient to establish probable cause to conduct a warrantless search of a vehicle in Tennessee. This Court should further hold there was not probable cause to conduct a warrantless search of Bishop's vehicle and vacate his conviction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tenn. Sup. Ct. R. 46, Rule 3.02, the total number of words in this *amici* brief, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, Certificate of Compliance, Attorney Signature Block, and Certificate of Service is 7,400 based on the word processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May 2025, a true and exact copy of the foregoing was served pursuant to Tenn. S. Ct. R. 46 (4.01) through the e-filing system and via electronic mail to:

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